

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs May 10, 2006

**STATE OF TENNESSEE v. JERRY LEE TRUETTE**

**Direct Appeal from the Circuit Court for Maury County  
No. 14078 Robert L. Holloway, Judge**

---

**No. M2005-00927-CCA-R3-CD - Filed July 19, 2006**

---

The defendant, Jerry Lee Truette, entered pleas of guilty to burglary, a Class D felony, and to theft over \$10,000, a Class C felony. See Tenn. Code Ann. §§ 39-14-402, -103, -105 (2003). According to the judgment forms, the trial court imposed concurrent, Range I sentences of two years and eleven months and twenty-nine days, respectively. After an evidentiary hearing, the trial court granted restitution in the amount of \$29,700 with monthly payments of \$500. In this appeal as of right, the defendant argues that the amount of restitution is excessive. The defendant's sentence for theft over \$10,000, as reflected on the judgment form, would be an illegal sentence. An appropriate Range I sentence for theft over \$10,000 is not less than three years nor more than six years. See Tenn. Code Ann. § 40-35-112(a)(3). Because the record indicates that the trial court did indeed impose a five-year sentence to be served on probation, the case must be remanded for the entry of a corrected judgment. Otherwise, the judgment of the trial court as to its order of restitution is affirmed.

**Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed and Remanded**

GARY R. WADE, P.J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Robin Farber, Assistant Public Defender, Columbia, Tennessee, for the appellant, Jerry Lee Truette.

Paul G. Summers, Attorney General & Reporter; Sophia S. Lee, Assistant Attorney General; Mike Bottoms, District Attorney General; and Lawrence Nickell, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

In May of 2003, the defendant broke into the Allendale Community Center in Maury County and stole several pieces of furniture that were being stored there by the victim, Jack Henley. Following the defendant's guilty pleas to the burglary and theft, the trial court conducted an evidentiary hearing to determine the appropriate amount of restitution. The victim testified as follows to the items that were stolen and not recovered and their value:

<u>Item</u>	<u>Value</u>
love seat	\$2,000
round oak table	\$2,500
chairs (6)	\$1,800
rocking chairs (3)	\$450
velvet seat cushion	\$150
hall tree	\$2,500
round china cabinet	\$4,000
silverware set	\$2,000
china cabinet	\$2,000
glass doors	\$2,000
mirror	\$1,500
end tables (2)	\$1,400
coffee table	\$700
walnut round table	\$2,500-\$3,000
Lillian Russell twin beds (2)	\$3,000
piano stool end tables	\$1,200

The victim determined that approximately eighty items had been stolen. He described them as antique family heirlooms, some of which pre-dated the Civil War. The victim recalled that an appraiser valued all eighty pieces, many of which were recovered, at between \$250,000 to \$300,000.

On cross-examination, the victim acknowledged that the values he attached to the stolen items were his personal estimates. He conceded that the unrecovered items had not been appraised by an antique dealer, except for the round china cabinet for which he claimed \$4,000. A Ms. Lille had estimated the replacement cost on that item as high as \$10,000. The victim testified that he arrived at his estimates based on "family tradition" and family evaluations. Although he explained that no one could "put [a] price on" his losses, he insisted that the pieces were worth more than the estimates he provided. The victim confirmed that when he initially reported the burglary, he did not list every stolen item. He acknowledged that he had originally made estimates to the police that differed with his testimony at the restitution hearing. He explained that he "couldn't think" at the time and had initially forgotten about some of the items that he had stored at the community center. The victim acknowledged that some of the furniture had been used as "regular piece[s] of furniture . . . in [his] home" before he moved them to storage.

The defendant, single and thirty-one years of age, admitted to stealing furniture from the Allendale Community Center but insisted that he could not remember exactly what he had taken. He testified that although he had dropped out of school in the eighth grade and had not received a GED, he was able to read and write well. He further testified that he did not have a bank account and did not own a vehicle, residence, or any other assets. The defendant described his health as good and maintained that he had plans to marry. His last job was as a logger, where he made about \$250 per week. The defendant testified that he paid \$37.50 per week for rent in addition to utilities and other living expenses, including a \$25 monthly hospital bill. He estimated a reasonable monthly

restitution payment in the amount of \$100. On cross-examination, the defendant acknowledged that seventy days after the hearing, he would be released and would begin work as required by the Williamson County Drug Court. He claimed that he would seek "better" employment and continue to work for the next five years.

At the conclusion of the hearing, the trial court ordered as follows:

I'm going to set the restitution at \$29,700. If he paid five hundred dollars a month, [the defendant] could get a job delivering pizza at night to pay back his victim.

So as soon as he gets out of Williamson County jail, he's to pay five hundred dollars a month. If he doesn't, file a revocation of probation.

In this appeal, the defendant contends that the amount of restitution is excessive. When a defendant challenges the validity and amount of restitution, this court must conduct a de novo review of both the amount of restitution ordered and the method by which it was determined. The trial court is entitled to a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (2003); State v. Johnson, 968 S.W.2d 883, 884 (Tenn. Crim. App. 1997).

The statute that governs restitution as a condition of probation provides, in pertinent part, as follows:

- (a) A sentencing court may direct a defendant to make restitution to the victim of the offense as a condition of probation.
- (b) Whenever the court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss.
- (c) The court shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of probation supervision that could have been imposed for the offense.
- (d) In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the defendant to pay or perform.
- (e) For the purpose of this section, "pecuniary loss" means:
  - (1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and
  - (2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

(f) A defendant, victim or district attorney general at any time may petition the sentencing court to adjust or otherwise waive payment or performance of any ordered restitution or any unpaid or unperformed portion thereof. The court shall schedule a hearing and give the victim and the defendant notice of the hearing, including the date, place and time and inform the victim and defendant that each will have an opportunity to be heard. If the court finds that the circumstances upon which it based the imposition or amount and method of payment or other restitution ordered no longer exist or that it otherwise would be unjust to require payment or other restitution as imposed, the court may adjust or waive payment of the unpaid portion thereof or other restitution or modify the time or method of making restitution. The court may extend the restitution schedule, but not beyond the term of probation supervision.

Tenn. Code Ann. § 40-35-304(a)-(f).

Special damages are those which are "the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence." State v. Lewis, 917 S.W.2d 251, 255 (Tenn. Crim. App. 1995) (quoting Black's Law Dictionary 392 (6th ed. 1990)). General damages are those which are "the necessary and immediate consequence of the wrong." Id. (quoting Webster's New International Dictionary 664 (2d ed. 1957)). It is unnecessary for the sentencing court to determine restitution in accordance with the strict rules of damages applied in civil cases. Johnson, 968 S.W.2d at 887. The rules of damages, however, are not completely discarded. State v. Bottoms, 87 S.W.3d 95, 108 (Tenn. Crim. App. 2001).

The sum of restitution ordered must be reasonable and does not have to equal the precise pecuniary loss. State v. Smith, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994). There is no set formula. Johnson, 968 S.W.2d 883 at 886. The sentencing court must consider not only the victim's loss but also the financial resources and future ability of the defendant to pay. Tenn. Code Ann. § 40-35-304(d); Bottoms, 87 S.W.3d at 108. "General statements by a victim regarding the amount of his or her loss containing no explanation as to how the victim arrived at the amount are insufficient." State v. Charles R. Turner, No. M2003-02064-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App., at Nashville, Dec. 1, 2004) (citing Smith 898 S.W.2d at 747). "While a victim's testimony standing alone may be sufficient to establish special damages for the purposes of restitution, the victim should explain how he or she arrived at the amount of damages requested. Further, documentation supporting the victim's testimony is helpful." Id. In ordering restitution, the trial court shall specify the amount of time and payment and may permit payment or performance of restitution in installments. Tenn. Code Ann. § 40-35-304(c). The court may not, however, establish a payment or schedule extending beyond the maximum statutory term of probation supervision it could have imposed for the offense. Id. If the defendant, victim, or district attorney petitions the trial court, it may hold a hearing and, if appropriate, waive, adjust, or modify its order regarding restitution. Id. at (f). Further, any unpaid portion of the restitution may be converted to a civil judgment. Id. at (h)(1); Bottoms, 87 S.W.3d at 108.

In this case, the pecuniary loss to the victim is the value of the stolen furniture. The term "value" as it relates to the theft statute is measured by "[t]he fair market value of the property . . . at the time and place of the offense" or "the cost of replacing the property within a reasonable time after the offense." Tenn. Code Ann. § 39-11-106(a)(36)(A) (2003). Because the furniture was antique and at least some of the pieces pre-dated the Civil War, the fair market value and replacement cost would, understandably, be difficult to calculate. An order of restitution, of course, may not be based on arbitrary estimates. See Smith, 898 S.W.2d at 747; State v. Wendell Gary Gibson, No. M2001-01430-CCA-R3-CD, slip op. at 4-5 (Tenn. Crim. App., at Nashville, June 24, 2002) (remanding because the victim's "conclusory statements regarding the value of several items without explaining her method for determining their value. . . . [were] insufficient to allow the trial court to make a reasonable, reliable determination as to the amount of the victim's loss"). Although he acknowledged that his own evaluations, with the exception of the \$4,000 estimate for the round china cabinet, were not based on appraisals by antique dealers or on any printed references, the victim did explain that his opinions of market value were based on traditional, family evaluations of the furniture. As owner of the property, the victim was entitled to testify as to value so long as his testimony was not arbitrary. Moreover, he did have an appraisal on all of the items he had stored at the community center. In our view, the trial court did not err by accrediting the testimony of an owner who had ascertained the estimated value of family heirlooms through conversations with others who had passed down their knowledge from one generation to another. His lump sum appraisal of all of the stored items served some benefit.

The record establishes that the defendant was making \$250 per week at his previous employment. The trial court observed that the defendant could get a second job in the evening to repay the victim. Nothing in this record suggests otherwise. If the monthly payment amount appears to be excessive based upon the anticipated income of the defendant, the trial court is in a better position to determine whether relief is warranted at some future date.

The judgments of conviction, the sentence for the burglary, and the order of restitution appear to be in proper order. The defendant's sentence of eleven months and twenty-nine days for theft over \$10,000, however, would be an illegal sentence. An appropriate Range I sentence for theft over \$10,000 is not less than three years nor more than six years. See Tenn. Code Ann. § 40-35-112(a)(3). The record is void of the guilty plea colloquy, the waiver of rights and plea acceptance form, and any written plea agreement. The testimony of the defendant at the evidentiary hearing and the defendant's brief, however, indicate that the trial court imposed a five-year probationary sentence. Moreover, the trial court's calculation of the amount of restitution was based upon a five-year probationary period. Therefore, this court must remand the case for the trial court to enter a corrected judgment and impose appropriate sentences. See Tenn. R. App. P. 36; Tenn. R. Crim. P. 36.

---

GARY R. WADE, PRESIDING JUDGE